LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
OCT 19 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-562

LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY, and HARRY RUBENSTEIN, his attorney, *Petitioners,*

v.

DICKSTEIN, SHAPIRO & GALLIGAN, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR COMMITTEE OF COUNSEL FOR THE CONSOLIDATED WHOLESALER-RETAILER CLASS ACTION AND FOR DICKSTEIN, SHAPIRO & GALLIGAN

Members of the Committee:

SCHWARTZ & ALSCHULER,
Co-Chairman
JAMES P. CHAPMAN
CHESTNUT, BROOKS & BURKHARD
COCHRANE & BRESNAHAN
PETER A. LOUTOS
PECK, SHAFFER & WILLIAMS
SAGER & BURNS
LEO SCHWARTZ
JAMES B. SLOAN
JEROME S. WALD

LEVY AND ERENS
By RICHARD F. LEVY
JAY ERENS
HOWARD A. TULLMAN
208 South LaSalle Street
Chicago, Illinois 60604
One of the Co-Chairmen of Respondent Committee of Counsel for the Consolidated Wholesaler-Retailer Class Action

DAVID I. SHAPIRO
JAMES VANR. SPRINGER
745 Fifth Avenue
New York, New York 10022
Attorneys for Respondent Dickstein, Shapiro & Galligan

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Argument	9
Conclusion	12

Appendix (Excerpts from opinion in *City of Philadelphia* v. *Chas Pfizer & Co., Inc.* (345 F.Supp. 454, March 31, 1972) stating fee criteria and describing role of Dickstein, Shapiro & Galligan in this litigation) 1a

CITATIONS

Ace Heating & Plumbing Co., Inc. v. *Crane Co.*, 453 F.2d 30 (3 Cir. 1971) 10
Berenyi v. *Immigration Director*, 385 U.S. 630 10
Cotler Drugs, Inc. et al. v. *Chas. Pfizer & Co., Inc., et al.*, No. 70-338, *certiorari denied*, 404 U.S. 871 .. 5
Graver Mfg. Co. v. *Linde Co.*, 336 U.S. 271 10
O'Hara v. *Oakland County*, 136 F.2d 152 (6 Cir. 1943) 8
City of Philadelphia v. *Chas. Pfizer & Co., Inc.*, 345 F. Supp. 454 (SDNY 1972) 2, 1a-16a
Powell v. *Pennsylvania R. Co.*, 267 F.2d 241 (3 Cir. 1959) 10
Sprague v. *Ticonic National Bank*, 307 U.S. 161 ..... 8, 9
Stuart v. *Boulware*, 133 U.S. 78 9
Trustees v. *Greenough*, 105 U.S. 527 9
United States v. *American Society of Composers*, 466 F.2d 917 (2 Cir. 1972) 8
W. W. Montague & Co. v. *Lowry*, 193 U.S. 38 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-562

LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY, and HARRY RUBENSTEIN, his attorney, *Petitioners,*

v.

DICKSTEIN, SHAPIRO & GALLIGAN, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION FOR COMMITTEE OF COUNSEL FOR THE CONSOLIDATED WHOLESALER-RETAILER CLASS ACTION AND FOR DICKSTEIN, SHAPIRO & GALLIGAN

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (Pet. App. A1-A56) is not yet reported; the pertinent portions of this lengthy opinion appear at Pet. App. A1-A19 (stating the general background and describing the procedures followed in the

district court) and A49-A55 (dealing specifically with the fee issues raised by the petition).[1] The district court's opinion incorporates by reference that court's earlier opinion on another aspect of counsel fees in the same litigation reported *sub. nom City of Philadelphia* v. *Chas. Pfizer & Co., Inc.*, at 345 F. Supp. 454; for the Court's convenience, the pertinent portions of that earlier opinion are set forth as an Appendix hereto at pp. 1a-16a, *infra*. The opinion of the Court of Appeals for the Second Circuit unanimously affirming the portions of the district court's decision challenged by the petition (Pet. App. A57-A80) is reported at 481 F.2d 1045. Earlier opinions on other aspects of this *Antibiotics* antitrust litigation are cited and explained in the court of appeals opinion (see Pet. App. A58-A59 and note 1).

JURISDICTION

The district court's jurisdiction was founded upon 28 U.S.C. § 1337, 15 U.S.C. § 15 and F.R. Civ. P. 23. The judgment of the court of appeals was entered on July 2, 1973 and the petition for a writ of certiorari was filed on September 27, 1973. The jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).[2]

QUESTIONS PRESENTED

The petition challenges two aspects of the district court's determination of the attorneys' fees to be paid

---

[1] The Appendix to the petition omits approximately two pages from the end of the district court opinion. These pages deal with administrative details that are not pertinent here.

[2] The jurisdiction of the court of appeals was founded upon 28 U.S.C. § 1291, not § 1292(b) as stated in the petition.

out of a class action settlement fund. The questions presented are:

1. Did both courts below err in finding that the attorney for a claimant class member conferred no benefit on the class and therefore was not entitled to a fee from the class fund?

2. Did both courts below err in finding that counsel for certain other classes in the litigation was largely responsible for creating the basic portion of this settlement fund and therefore was entitled to a partial fee from the fund?

STATUTES INVOLVED

While this litigation was brought under Section 4 of the Clayton Act and F.R. Civ. P. 23 (set forth in whole and in part, respectively, at Pet. App. 4), the counsel fee determinations challenged in the petition were pursuant to the district court's inherent powers and not governed by any statutory provisions.

STATEMENT

This petition arises from the dissatisfaction of one of the more than 4400 claimant members of the wholesale-retail druggist class in this antitrust litigation—and his attorney—with the district court's allocation of attorneys' fees out of the settlement fund obtained for that class. That fund (totaling about $13 million) was created as a part of an overall settlement also including, as the principal beneficiaries, classes of state and local governmental entities ("CCS") and individual purchasers of the antibiotic drugs in suit. The claimant's attorney is dissatisfied because the district court did not require the class to pay him a fee, and the

claimant is dissatisfied because the district court determined that the class should compensate the lead CCS-consumer attorneys (respondent Dickstein, Shapiro & Galligan) for their role in the creation of the druggist settlement fund. The court of appeals, with an extensive opinion, affirmed the district court on these and other points not raised in this Court (Pet. App. A57-A80).

While there were numerous parties in the earlier phases of the district court proceedings, only five parties (or groupings of parties) appeared in the court of appeals. Of the three appellant groups, two have not sought further review. This brief in opposition is submitted on behalf of both appellees below—(1) The Committee of Counsel for the Consolidated Wholesaler-Retailer Class Action, which was constituted by the district court in the first stage of the proceedings to include all counsel of record for druggist plaintiffs;[3] and (2) Dickstein, Shapiro & Galligan.[4]

While the Committee of Counsel opposed the Dickstein, Shapiro & Galligan fee award in the district court, it did not appeal from the district court's decision, believing that such an appeal would not be in the best interests of the wholesaler-retailer class. Accord-

---

[3] Petitioner Rubenstein is not a member of the Committee because, as explained *infra*, he filed no action and did not appear, as counsel for a claimant class member, until some ten months after the wholesaler-retailer cases were structured as a single class action for settlement purposes and the Committee constituted on May 26, 1969 (see J.A. 11).

[4] Although the name of this law firm has been changed, it has continued to appear under its original name to reflect the fact that the new members of the successor firm have no interest in the fees to be awarded in this case.

ingly, respondents are in agreement that the petition raises no issue remotely warranting review by this Court.

This litigation (commonly referred to as the settled *Antibiotics* antitrust litigation) was previously before this Court in the 1971 Term on the petition of the same claimant and a few others for review of the district court's approval of the settlement. *Cotler Drugs, Inc. et al.* v. *Chas. Pfizer & Co., Inc., et al.*, No. 70-338, *certiorari denied*, 404 U.S. 871. At that time, the settlement and the allocation of the funds among the plaintiff classes became final. The ensuing proceedings resulting in this petition have dealt with the "second stage" distribution of the settlement funds among the individual members of the wholesaler-retailer class and the determination of attorneys' fees and other expenses chargeable to that class.[5] The proceedings as a whole are succinctly described in the court of appeals opinion (A58-A62); we confine ourselves here to a brief statement of the facts necessary for an understanding of the two subsidiary questions relating to fees that are raised by the petition.

1. Petitioner Rubenstein's Claim for a Fee.

Petitioner Rubenstein first appeared in this litigation in March 1970 as counsel for petitioner Patlogan, who had filed a claim as a member of the wholesaler-retailer class (J.A. 2).[6] By that time, the basic settlement had long since been agreed upon. As the court of appeals observed, "Patlogan never filed an individual action

[5] Neither the present petition nor the opinions below relate to the CCS-consumer cases, the "second stage" aspects of which are proceeding separately.

[6] The reference is to the Joint Appendix in the court of appeals.

before the class consolidation" and "[b]y his own account, Rubenstein had nothing to do with either the basic settlement or escrow fund negotiations," which established the wholesaler-retailer settlement fund against which Patlogan and some 4,400 other druggists made their claims. Thus, the court of appeals agreed with the district court that Rubenstein's efforts were "on behalf of his client, not the class," and his compensation should come only from his client and not from the settlement fund to which he had added nothing. Pet. App. A71-A72; see also Pet. App. A53-A55.

The one alleged benefit that the petition claims Rubenstein conferred upon the class as a whole was discussed fully by the court of appeals, as follows:

> "[This argument] involves the fact that [Rubenstein] and others initiated the appeal from Judge Wyatt's approval of the settlement offer, which, by preventing the settlement from becoming final, added about $650,000 in escrow interest to the wholesaler-retailer share of the final total.[7] Rubenstein claims a substantial award for conferring this benefit upon the class.
>
> "We do not think that Judge Wyatt abused his discretion in rejecting this argument. True, as we noted in our previous opinion, 440 F.2d at 1091-92, the appeal did add funds to the class share. And,

[7] This was the appeal that brought the litigation to this Court earlier, as noted at p. 5, *supra*. The final settlement agreement provided that the wholesaler-retailer fund would consist of two elements: (1) $3 million out of defendants' overall $100 million settlement offer and (2) the interest accrued on the entire $100 million over a period of 13 or 14 months, depending on the date when the settlement was finally approved. The appeal delayed approval and thereby added the 14th month's interest, which amounted to about $650,000.

despite some suggestions to the contrary, we were unable to find that the appeal was motivated by bad faith. *Id.* at 1092. But it does not necessarily follow that those who took the appeal must inexorably be the beneficiaries of consequent attorneys' fees.

"As the district judge noted, the CCS plaintiffs, alarmed by the delay inherent in the appeals process, offered to turn over the $650,000 in interest to the wholesaler-retailer class if the proceeding were withdrawn. Rubenstein and the others rejected that offer and continued to prosecute the appeal, a course which, both in Judge Wyatt's view and ours, was quite probably not in the best interests of the class. On April 16, 1970, this court had reversed the criminal convictions that had been suffered by the defendants here. If the appeal, which was taken after that date, had ultimately been successful and had overturned the settlement, the defendants, without the impetus of the criminal convictions, might well have walked away from the whole deal. Since the appeal at least exposed the class to that danger, Judge Wyatt did not abuse his discretion in refusing to award Rubenstein for it. * * * In the absence of even the hint of a showing of some benefit to the class in this case, Rubenstein has no real claim to attorneys' fees." [Pet. App. A72-A73; footnotes omitted.]

2. The Fee Award to Dickstein, Shapiro & Galligan

While the Dickstein, Shapiro & Galligan law firm (referred to as "Shapiro" by the courts below) was retained in the litigation by some twenty CCS plaintiff-class representatives and did not appear formally in the wholesaler-retailer cases, the district court found Shapiro's dominant efforts in prosecuting and settling the entire complex of litigation "largely responsible for the creation of the [basic] $3,000,000 fund allocated

to the retailer class." It concluded that "It is fair, just and reasonable that Shapiro receive an allowance from that fund; those who accept the benefit, namely, the retailer class, ought to contribute to allowances to counsel who made possible the benefit." Pet. App. A52-A53.

The court of appeals found ample support for these findings and agreed that such a fee award was proper as a matter of law under the circumstances, holding that

> "While it is true that Shapiro did not represent any wholesaler-retailer class members, the court's power to make an attorneys' fee award under these circumstances seems clear from *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), and its progeny. In *Ticonic Bank*, Mr. Justice Frankfurter recognized the historic powers of the equity court to allow counsel fees and costs to a party whose efforts result in the creation of a fund that benefits others. That equity power was not limited merely because the benefited party did not sue on behalf of the eventual fund beneficiaries. * * *
>
> "Since Judge Wyatt gave Shapiro credit for creating the fund that benefits the wholesaler-retailer class here, the fact that the firm did not sue on behalf of that class presents no bar to an allowance out of the fund. See also *United States* v. *American Society of Composers*, 466 F.2d 917 (2d Cir. 1972). Nor does the characterization of the CCS entities as 'adversaries' of the retailer class compel a different result. *O'Hara* v. *Oakland County*, 136 F.2d 152 (6th Cir. 1943). The relevant factor is the creation of the fund, not what Justice Frankfurter termed 'the formalities of the litigation.'" [Pet. App. A78-A79.]

In affirming these two elements of the district court's fee determination, the court of appeals placed great

reliance on District Judge Wyatt's familiarity with the contributions of counsel derived from his long exposure to the litigation (see Pet. App. A70, A79). Nonetheless, while agreeing with his statement of the applicable legal principles and endorsing the principle that attorneys' fees are peculiarly a matter for the trial judge's reasonable discretion (Pet. App. A65), the court of appeals did remand certain aspects of the fee determination (not involved in the present petition) for reconsideration. That same thorough review found no suspicion of error or abuse of discretion with respect to the matters challenged here by a single claimant and his attorney.

ARGUMENT

The petition presents no question of law. It is common ground that the principle of *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, gave the district court discretionary power to compensate either petitioner Rubenstein or respondent Dickstein, Shapiro & Galligan or both to the extent it reasonably found such compensation warranted by the facts and equitable considerations. The only issue raised by the petition is whether the district court misapprehended the facts or abused its discretion in declining a fee to one and awarding a fee to the other. The court of appeals reviewed the district court's determinations with meticulous care and unanimously found no suggestion of error or abuse with respect to the matters challenged by the petition. Especially in view of the latitude that trial courts have in such fee matters (*Trustees* v. *Greenough*, 105 U.S. 527, 539; *Stuart* v. *Boulware*, 133 U.S. 78, 82; *W. W. Montague & Co.* v. *Lowry*, 193 U.S. 38, 48), there is not the slightest reason why this

Court should review the concurrent findings of the two courts below. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275; *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635.

There is no basis for the contention that the denial of Rubenstein's request "stifled dissent." The Rubenstein denial was not based upon any categorical disqualification, and in fact the court awarded a fee to another dissident (see Pet. App. A46-A49). The concurrent findings of the two courts below were based simply upon a determination that Rubenstein—who appeared under Rule 23(c)(2)(C) on behalf of a single claimant member of a class that was already well represented—had not made "even the hint of a showing of some benefit to the class" (Pet. App. A73). There is therefore no conflict with *Ace Heating & Plumbing Co., Inc.* v. *Crane Co.*, 453 F.2d 30 (3 Cir. 1971), which held only that dissent did not "result in forfeiture of the right to be reimbursed for compensable legal services" (453 F.2d at 35). It is a far cry from that holding to the untenable proposition that all dissenters *must* be rewarded without regard to benefit.

Petitioners' contention that Dickstein, Shapiro & Galligan have been awarded "double fees" mischaracterizes the district court's determination of this matter and its relationship to the fees to be awarded on account of other aspects of the litigation. *Powell* v. *Pennsylvania R. Co.*, 267 F.2d 241 (3 Cir. 1959), with which petitioners suggest some inconsistency, was concerned with an attorney's collecting twice from the *same client* for the same services or benefits—as a class member and under a private fee contract (267 F.2d at 247). Here, in contrast, there was no question either

of double payment by the wholesaler-retailer class or of double compensation to any attorney. The court of appeals specifically held that the aggregate fees awarded counsel for the class were reasonable in relation to the escrow-interest portion of the fund by itself (Pet. App. A69) and that the Shapiro award was reasonable in relation to the basic $3,000,000 fund (Pet. App. A80, n. 13); petitioners do not challenge those holdings. Nor is there any potential element of double compensation in the finding that the wholesaler-retailer class fund—as well as the CCS and consumer class funds—should contribute *a share* of the total fair compensation due to Shapiro.[8] While the respondent Committee disagreed with the district court's factual finding that Shapiro was responsible for creating the portion of the wholesaler-retailer fund that was charged with a share of his fee, the Committee concluded that appellate review of that discretionary determination was inappropriate.

---

[8] Petitioners' faint reference to "false affidavits" (Pet. 19) echoes charges that they argued extensively below but which the court of appeals did not deem worthy of mention in its opinion. The district court had earlier rejected these charges as wholly "frivolous" and "irresponsible" (Jan. 31, 1972 tr. 39-42). See also Brief in Opposition for City, County and State Respondents in No. 70-338 at pp. 10-11.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Members of the Committee:

SCHWARTZ & ALSCHULER,
Co-Chairman
JAMES P. CHAPMAN
CHESTNUT, BROOKS & BURKHARD
COCHRANE & BRESNAHAN
PETER A. LOUTOS
PECK, SHAFFER & WILLIAMS
SAGER & BURNS
LEO SCHWARTZ
JAMES B. SLOAN
JEROME S. WALD

LEVY AND ERENS
By RICHARD F. LEVY
JAY ERENS
HOWARD A. TULLMAN
208 South LaSalle Street
Chicago, Illinois 60604
One of the Co-Chairmen of Respondent Committee of Counsel for the Consolidated Wholesaler-Retailer Class Action

DAVID I. SHAPIRO
JAMES VANR. SPRINGER
745 Fifth Avenue
New York, New York 10022
Attorneys for Respondent Dickstein, Shapiro & Galligan